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No. 95-1477

In The

Supreme Court of the United States

October Term, 1995

WILLIAM J. SCHULTE, M.D., *et al.*,

Petitioners,

versus

WOODROW SMITH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE LOWER COURTS' REVIEWS OF THE JURY'S WRONGFUL DEATH AWARD COMPORTED WITH DUE PROCESS?

2. WHETHER A STATE COURT OF LAST RESORT WHICH DECLARES A STATE STATUTE UNCONSTITUTIONAL UNDER PURELY STATE CONSTITUTIONAL GROUNDS HAS THE AUTHORITY TO DETERMINE THE RETROACTIVITY OR PROSPECTIVITY OF ITS DECISION?

3. WHETHER DUE PROCESS REQUIRES THE RECUSAL OF AN ASSOCIATE STATE SUPREME COURT JUSTICE BECAUSE SHE WROTE A LAW REVIEW ARTICLE WHICH TOUCHED GENERALLY UPON THE SAME CONSTITUTIONAL ISSUES AS THOSE IN SUIT?

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STATEMENT OF THE CASE

Although the facts concerning liability are irrelevant to the issues raised by the petition, Petitioners have grossly distorted the actual evidence submitted at trial. Respondent thus feels compelled to recite enough of the facts to inform the Court of the bases for the decisions rendered by the courts below.

A. Factual Background

On September 28, 1989, Respondent's wife, Mrs. Annie Jo Smith, was admitted to Knollwood Park Hospital in Mobile, Alabama for severe injuries arising out of an automobile accident. [Pet. App. at 2]. Two days after her admission, Petitioner, Dr. Schulte, decided to place Mrs. Smith on a ventilator, which was achieved by internally inserting an endotracheal tube and connecting the tube to a mechanical ventilator. [Pet. App. at 2]. No emergency existed when Dr. Schulte made this decision. [R-229,234,244]. Dr. Schulte decided to perform the intubation because Mrs. Smith was becoming tired from breathing approximately 40 times a minute, and he believed the mechanical ventilator would "do the work for her," allowing her to rest. [R-229,234,244].

First, while trying to insert a Swan-Ganz catheter, Dr. Schulte penetrated Mrs. Smith's right lung, causing it to collapse. [R-267]. Between 9:05 a.m. and 9:15 a.m., Dr. Schulte began inserting an endotracheal tube into Mrs. Smith's mouth. [Pet. App. at 2]. The evidence established that Dr. Schulte placed the endotracheal tube down Mrs. Smith's esophagus (stomach), rather than her trachea, thereby cutting her airway off from the only source of oxygen available to her. [R-245-46,479-80]. Mrs. Smith immediately began to physically struggle and resist the intubation. [Pet. App. at 2].

Although the standard of care required him to do so, Dr. Schulte did *not* check Mrs. Smith's lungs and stomach by stethoscope to ensure the proper placement of the tube, until after Mrs. Smith suffered a full cardiac arrest.

[R-26-61;483;489]. The evidence established that Dr. Schulte deviated from the standard of care when he "failed to timely identify and correct the esophageal intubation before it led to a significant anoxic event that affected both the heart and the brain." [R-489]. Mrs. Smith's death on October 4, 1989, was proximately caused by Dr. Schulte's placement of the endotracheal tube into Mrs. Smith's esophagus instead of her lungs. [R-497].

The evidence at trial also revealed that Dr. Schulte ordered the administration of the drug *Pavulon* to paralyze Mrs. Smith during the intubation (in order to control her combativeness), but this did nothing to alter her mental state, so that she was conscious during this entire procedure. [R-480]. As a result of the esophageal intubation while she was paralyzed, Mrs. Smith was "aware that she was smothering to death until the time – until such time as her brain became so anoxic that it destroyed her knowledge of what was going on around her." [R-480]. In other words, Mrs. Smith knew she was smothering and could do nothing about it.

Although Petitioners now contend that the tube "came out of the trachea and dropped back into the esophagus" during the struggle (Pet. at 4), Dr. Schulte testified at trial that he held the tube at Mrs. Smith's lips at 22 centimeters during the entire course of events and that he did not feel the tube move up and down at any time.[1] [R-316; R-319].

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[1] The evidence at trial revealed that if Dr. Schulte was holding the tube at 22 centimeters, and if the tube was placed in the trachea, the tube would have been two and a half inches below where the trachea and esophagus separate. [R-316]. Therefore, in order for the tube to have moved from the trachea into the esophagus, as Petitioners now allege, the far end of the tube would have had to move up the trachea two and a half inches and then back down into the esophagus while the other end remained stationary! [R-319]. The evidence established that such a scenario would be impossible without the treating doctor noticing movement at the patient's lips. [R-517].

Although Petitioners claim that "Dr. Schulte immediately removed the old tube and placed a new tube" once he saw gastric contents rising in the tube (Pet. at 4), the evidence at trial revealed that Dr. Schulte's second attempt at intubation was below the standard of care as well. [R-489]. In his second attempt to intubate Mrs. Smith, Dr. Schulte placed the tube so far down the trachea that it moved into the left main stem bronchus. [R-308]. Because of this misplacement of the tube, although oxygen was being pushed into Mrs. Smith's left lung, no oxygen was being pushed into Mrs. Smith's right lung. [R-309]. After discovering the problem with the second intubation, it took Dr. Schulte two attempts to pull the tube back far enough that the oxygen was reaching both lungs. [R-312-13]. "It was a period of at least ten minutes, perhaps longer, before the tube was actually repositioned in the trachea so that both lungs were receiving the oxygen." [R-499]. The evidence established that Dr. Schulte's breaches of the standard of care on the second intubation had a causal effect on Mrs. Smith's death because they increased the time during which her oxygen levels were so low that she was not receiving a sufficient amount of oxygen to her brain. [R-498].

Finally, contrary to Petitioners suggestions, Mrs. Smith's injuries from the automobile accident were definitely "survivable" (R-500), and Mrs. Smith did *not* die from ARDs. [R-501-12]. The evidence at trial was "that the ARDs that [Mrs. Smith] developed was significant, but showed definite signs of improving", and was "a survivable condition were it not for the anoxic brain damage." [R-515].

B. Course of Proceedings Below

Immediately after Mrs. Smith's anoxic event, Dr. Schulte openly confessed to respondent and his family

that he had improperly placed the tube in the esophagus and then failed to promptly correct the situation. Shortly thereafter, Mr. Smith filed a wrongful death action under Alabama's Wrongful Death Act. After receiving the summons and complaint, Dr. Schulte notified his insurer, Mutual Assurance, Inc., of the lawsuit. [Schulte Post-Judgment Depo. at 10]. Thereafter, Dr. Schulte met with an adjuster from Mutual Assurance and informed him that "the tube had been found in the wrong place, and that contributed to her demise." [*Id.* at 11]. Dr. Schulte also informed the adjuster that the misplaced tube "was a significant factor in the death of this woman." [*Id.*]

Once discovery established that Dr. Schulte's failure to properly place the tube resulted in Mrs. Smith's brain death, Mr. Smith's counsel made a written demand for settlement in the amount of $2.5 million. [Ex. 1 to Schulte Depo.] After receiving this letter, Dr. Schulte met with his counsel and demanded that Mutual Assurance settle the case "for the policy limit." [Schulte Depo. at 14]. Mutual Assurance, however, refused to settle the case. A month before trial, Mr. Smith's counsel made another offer to settle the case, this time for policy limits. Dr. Schulte, once again, on behalf of himself and Pulmonary Associates, demanded that Mutual Assurance settle the case for policy limits. [Schulte Depo. at 17, 19; Ex. 4]. Mutual Assurance, once again, refused to settle the case. [*Id.* at 7]. Dr. Schulte informed Mutual Assurance that if it wanted to gamble on the verdict, he expected Mutual Assurance to pay any verdict in excess of his policy limits. [Schulte Depo. at 27].

After a seven-day trial, the jury assessed $4.5 million in punitive damages against Petitioners for Mrs. Smith's wrongful death. [C-1068].[2]

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[2] Under Alabama's wrongful death statute, punitive damages are the only type of damages which may be awarded. This Court approved of Alabama's Act in *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 47 S. Ct. 509, 71 L. Ed. 952 (1927).

Immediately following the jury's verdict, Petitioners each retained the services of a separate lawyer (i.e., not counsel hired by their insurer, Mutual Assurance) to represent their personal interests. [C-675 (notice of appearance); C-682 (same); R-1141; R-1204]. During post-judgment discovery, Dr. Schulte testified that, in the event the judgment ultimately exceeded the limits of coverage, he and Pulmonary Associates intended to pursue negligent-failure-to-settle claims against Mutual Assurance. [Schulte Depo. at 65-66].

After post-judgment hearings, the trial court declared Alabama Code Section 6-5-547 constitutional. [Pet. App. at 62-69]. The trial court also denied Petitioners' motions for JNOV, new trial, and/or remittitur, finding that "[t]he record contain[ed] a superabundance of evidence that Dr. Schulte's neglect of his esophageal intubation of Mrs. Smith was fatal and inexcusable." [Pet. App. at 54].

Mr. Smith timely appealed the portion of the trial court's judgment denying his motion to declare Section 6-5-547 unconstitutional. [C-1072]. Petitioners, in turn, cross-appealed from the portion of the trial court's judgment denying their post-judgment motions for a new trial, JNOV, and remittitur. [C-1077]. Importantly, Petitioners did *not* challenge the sufficiency of the evidence regarding liability on appeal.

On August 18, 1995, the Alabama Supreme Court declared the subject statute unconstitutional. [Pet. App. at 22]. While the Alabama Supreme Court found no trial errors (affirming the trial court's denial of Petitioners' Motions for New Trial and JNOV), the court conducted an independent review of the punitive damages verdict pursuant to *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), and entered an order conditionally granting a new trial for excessiveness, unless Mr. Smith accepted a remittitur of the verdict from $4.5 million to $2.5 million.

[Pet. App. at 27]. On September 5, 1995, Mr. Smith filed notice of his acceptance of the remittitur.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. NO COMPELLING REASONS EXIST FOR THIS COURT TO REVIEW THE ALABAMA SUPREME COURT'S DECISION IN *SMITH V. SCHULTE*

This Petition should be denied because the issues presented bear none of the characteristics deemed "compelling" under Supreme Court Rule 10. First, the review of the punitive damages verdict in this case comported in all respects with the procedure approved by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). Second, this Court has long recognized that it is for the states to decide whether to retroactively apply decisions based on purely state law grounds. *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). Finally, Petitioners' shrill attacks on Alabama Supreme Court Associate Justice Janie Shores are meritless, unfounded, and offensive. Justice Shores' refusal to recuse herself in the underlying appeal did not conflict with relevant decisions of this Court, nor with any decision of another state court of last resort or of a United States Court of Appeals.

A. No Compelling Reasons Exist For This Court To Review The Alabama Courts' Post-Judgment Reviews Of The Jury's Award In *Smith v. Schulte*

In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), this Court found that Alabama's procedure for the post-judgment review of a jury's punitive damages award comported with the Due Process Clause. *Haslip*, 499 U.S. 23-24. Specifically, the *Haslip* Court found that the post-judgment standards created by the Alabama Supreme Court in *Hammond v. City*

of Gadsden, 493 So. 2d 1374 (1986), and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (1989), ("the *Hammond/Green Oil* factors"), "impose[] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *Id.* at 22. Importantly, however, contrary to Petitioners' repeated contentions (See Pet. at 8 n.4 & 9), *Haslip* never "mandated consideration of each and every element" enumerated as the *Hammond/Green Oil* factors nor mandated "an independent review by the appellate court that includes an analysis of comparable cases and a detailed substantive review." Instead, recognizing that it could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case" (*Haslip*, 499 U.S. at 18), the *Haslip* Court held that "[t]he standards [imposed through the *Hammond/Green Oil* post-judgment review] provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." *Haslip*, 499 U.S. at 22. Stated another way, unlike Petitioners' insinuations, nothing about *Haslip* requires the Alabama courts tos exhaustively consider each *Hammond/Green Oil* factor sentence by sentence, line by line in every opinion they release which discuss punitive damages awards. Because the Alabama courts' post-judgment reviews in the present case comported with *Haslip*, this Court has no compelling reason to grant certiorari.

B. No Compelling Reasons Exist For This Court To Review The Alabama Supreme Court's Retroactive Application of *Smith v. Schulte*

In *Smith v. Schulte*, the Alabama Supreme Court held that Alabama Code Section 6-5-547 violated the Alabama Constitution of 1901. The court's decision was based exclusively on state law. Because state courts have the authority to determine the retroactivity of their own decisions when questions of state law are at issue, Petitioners' retroactivity argument presents nothing for this Court to

review. *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 177, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990) (citing *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932)) ('We think the federal constitution has no voice upon the subject [of whether a state court may decline to give its decisions retroactive effect]').

C. No Compelling Reasons Exist For This Court To Review Justice Shores' Refusal To Recuse Herself

The opinions Justice Janie Shores expressed in her law review article do not require recusal based on constitutional grounds. The outcome of the appeal in this case was controlled by the Alabama Supreme Court's earlier decision in *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991).[3] Justice Shores' concurrence in *Moore predated* publication of her law review article. Because the court's decision in the present case was decided in light of the court's previous decision in *Moore*, Justice Shores' article had no affect on the court's decision. Moreover, even under an "appearance of impartiality" argument, Justice Shores' expressions of opinions did not come close to rising to the level of "extreme bias or prejudice" to merit disqualification under the Due Process Clause. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821, 106 S. Ct. 1580, 89 L. Ed. 2d 823, 832 (1986) ("[O]nly in the most extreme of cases would disqualification [based on allegations of bias or prejudice] be constitutionally required [under the Due Process Clause].").

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[3] *Moore* declared unconstitutional another "tort reform" statute which imposed a $400,000 cap on non-economic damages in medical malpractice cases.

D. This Petition Should Not Be Granted Under The Guise Of *BMW of North America, Inc. v. Gore*

This Court's decision in *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 115 S. Ct. 932, 130 L. Ed. 2d 879 (1995), will not control the present case. In *Gore*, this Court granted certiorari to examine whether the punitive damage award violated due process because it was "grossly excessive" in light of *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 997, 113 S. Ct. 2711, 125 L. Ed. 2d 366, 378-79 (1993). In the present case, Petitioners do not contend that the wrongful death jury award in this case was "grossly excessive" anywhere in their petition, but, instead, ask this Court to review Alabama's post-judgment review in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). Therefore, *Gore* has no bearing on this petition.

II. THE ALABAMA SUPREME COURT'S DECISION IN *SMITH V. SCHULTE* DID NOT VIOLATE THE DUE PROCESS CLAUSE

Even if this Court decides to hear this case, the decision below will ultimately be affirmed because the Alabama Supreme Court's decision did not violate the Due Process Clause.

A. The Alabama Courts' Reviews Of The Jury's Wrongful Death Award Did Not Violate The Due Process Clause

1. The Alabama Courts' Reviews Comported With *Haslip*

The Alabama courts' reviews of the jury's wrongful death award in *Smith v. Schulte* did not violate the Due Process Clause. In *Haslip*, this Court refused to establish a mathematical bright line test for determining when a punitive damages award violates the Due Process Clause, observing instead that "the general concerns of reasonableness and adequate guidance from the court when

the case is tried to a jury properly enter into the constitutional calculus." *Id.* at 18. In light of those general concerns of reasonableness, *Haslip* approved Alabama's post-judgment procedure for reviewing punitive damages awards, essentially finding that meaningful review of the types of factors enumerated in *Hammond* and *Green Oil* assured procedural protection:

> "Pacific Mutual thus had the benefit of the full panoply of Alabama's procedural protections. The jury was adequately instructed. The trial court conducted a post-verdict hearing that conformed with Hammond. The trial court specifically found that the conduct in question 'evidenced intentional malicious, gross, or oppressive fraud,' App to Pet for Cert A14, and found the amount of the award to be reasonable in light of the importance of discouraging insurers from similar conduct, id., at A15. Pacific Mutual also received the benefit of appropriate review by the Supreme Court of Alabama. It applied the Hammond standards and approved the verdict thereunder. ***It brought to bear all relevant factors recited in Hornsby.***"

Id. at 23 (emphasis added).

In the present case, the jury was adequately instructed with regard to Alabama's Wrongful Death Act. Moreover, both the trial court and the Alabama Supreme Court reviewed the jury's wrongful death award in light of the *Hammond/Green Oil* factors. [Pet. App. at 51-62; 22-27 (respectively)]. After it "considered all of those factors that [were] *relevant*" (Pet. App. at 23), the Alabama Supreme Court remitted the jury's wrongful death award by $2 million. [Pet. App. at 27]. Because the jury's instructions combined with the post-judgment reviews by the trial court and Alabama Supreme Court "impose[d] sufficiently definite and meaningful constraint on the discretion of [the jury in this wrongful death case]," Petitioners were afforded all of the procedural protections guaranteed by the Due Process Clause.

Although Petitioners contend that "the excessiveness reviews conducted by both the trial court and the Alabama Supreme Court in this case fail to meet the requirements of *Haslip*," (Pet. at 9), the trial court's detailed order and the Alabama Supreme Court's opinion unequivocally show that both courts conscientiously reviewed the jury's wrongful death verdict in light of all of the relevant *Hammond/Green Oil* factors. [Pet. App. at 51-62; 22-27 (respectively)]. Specifically, the trial court conducted lengthy hearings wherein the parties were given an unlimited opportunity to present their arguments and evidence on the constitutional and *Hammond/Green Oil* issues.[4] At the close of these hearings, the trial court asked the parties for assistance in preparing an order reflecting its rulings denying Petitioners' post-judgment motions and Mr. Smith's motion to declare § 6-5-547 unconstitutional. The trial court then meticulously and repeatedly edited the parties' proposed orders. Specifically, the trial court separated its *Hammond/Green Oil* review into four categories and considered: (1) "the severity of defendants' conduct" (Pet. App. at 54-55); (2) "impact of verdict if not remitted" (Pet. App. at 55-56); (3) "mitigating factors" (Pet. App. at 56); and (4) "comparative analysis with other cases" (Pet. App. at 56-61). This carefully drafted order reflects a sober and thoughtful analysis in line with Hammond/Green Oil and "meaningful review" in accord with *Pacific Mutual Life Ins. Co. vs. Haslip*, 499 U.S. 1 (1991). Thus, defendants' due process rights were safeguarded by the trial court, and the verdict does not exceed the amount necessary to punish and deter.

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[4] The trial court conducted *four* post-judgment hearings on the constitutional and *Hammond/Green Oil* issues – April 20, 1993 (R-1141-64); April 23, 1993 (R-1164-1223); April 30, 1993 (R-1224-1234); and November 5, 1993 (R-1235-76).

On appeal, the Alabama Supreme Court conducted an independent review of the jury's wrongful death verdict and "considered all of [the *Hammond/Green Oil*] factors that [were] relevant." [Pet. App. at 23]. Although the Alabama Supreme Court did not explicitly recite every *Hammond/Green Oil* factor it considered, the court discussed three specific factors which it considered particularly influential in its review. [Pet. App. at 23-27]. Most importantly, two of the three factors discussed by the court were ***mitigating factors***: (1) "attempts at concealment or cover-up" and (2) "financial impact of the verdict." [Pet. App. at 25-27].

When examined in light of the trial court's findings, the Alabama Supreme Court's conclusion regarding Dr. Schulte's "candor" is an excellent example of how the court did, in fact, conduct an independent appellate review of the verdict in light of the *Hammond/Green Oil* factors. During its post-judgment review of the verdict, the trial court held that one factor supporting its refusal to remit the verdict was that Petitioners' misconduct was "reprehensible in the extreme." [Pet. App. at 54]. One basis for this conclusion was the trial court's belief that the jury could have concluded that Petitioners lacked candor at trial. [Pet. App. at 54]. The court found:

> "Further, while Dr. Schulte made damning admissions to Mrs. Smith's husband and daughter during the 24-hour period following Mrs. Smith's death, these episodes of contrition and candor were as fleeting as they were telling. During the trial itself, Dr. Schulte and his witness were so impeached that the jury reasonably could have concluded that the defendants were obsessed with self preservation, untempered by any remaining sense of contrition, to the utter exclusion of any duty of candor."

[Pet. App. at 54]. On appeal, the Alabama Supreme Court considered Dr. Schulte's admissions within three hours after the surgery to the Smiths that "he had misplaced the endotracheal tube and that he had failed to discover the

error for several minutes," as well as his express notations in the medical chart of the misplacement of the endotracheal tube, "a significant countervailing factor." [Pet. App. at 25]. This contrast between the trial court's and the Alabama Supreme Court's conclusions regarding Petitioners' candor demonstrates that the Alabama Supreme Court, in keeping with *Haslip*, conducted an independent review of the jury's wrongful death verdict, rather than "rubber stamping" the trial court's post-judgment order and, therefore, afforded Petitioners with due process protection as well.

2. Alabama's Post-Judgment Review, In Light Of A Presumption Of Correctness, Does Not Violate Due Process

"Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 997, 113 S. Ct. 2711, 125 L. Ed. 2d 366, 378-79 (1993). This Court has already held in *Haslip* that Alabama's post-judgment review procedures are fair. *Haslip*, 499 U.S. at 22. Therefore, under *TXO*, Alabama's post-judgment review procedures, in light of a presumption of correctness, do not violate due process.

Petitioners incorrectly argue that "Alabama's review contemplates letting the award stand unless it is so excessive as to be the result of bias, passion, prejudice or other improper motive." [Pet. at 16 (citing *Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916, 925 (Ala. 1981)]. Actually, although a punitive damages award in Alabama may be deemed excessive if it is "tainted by bias, passion, prejudice, or other improper motive," Alabama law also recognizes that a jury's award of punitive damages may be excessive *despite a lack of* bias, passion, prejudice, or other improper motive. In fact, in *Green Oil*, the Alabama Supreme Court explained:

> "This Court has recognized, however, that even though a jury verdict may not be excessive because it is the result of an improperly functioning jury, it is possible for a verdict to be excessive even when it is the result of a properly functioning jury. For example, in assessing punitive damages, the jury is not allowed to consider the financial position of the defendant. The defendant's financial position is, however, a consideration essential to a post-judgment critique of a punitive damages award. Bearing in mind that punitive damages must not exceed an amount that will accomplish society's goals of punishment and deterrence, it is possible for a jury to hear the evidence in the case, make findings of fact, correctly apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of those goals."

Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989) (citations omitted). Therefore, in Alabama, a jury's award of punitive damages may be excessive as a matter of law in two ways: " '1) the jury's decision-making process was tainted by bias, passion, prejudice, or other improper motive; ***or*** 2) the verdict goes beyond that necessary to accomplish society's goals of punishment and deterrence.' " *Continental Eagle Corp. v. Mokrzycki*, 611 So. 2d 313, 321 (Ala. 1992) (emphasis added) (quoting *Killough v. Jahandarfard*, 578 So. 2d 1041, 1046 (Ala. 1991)). In other words, under Alabama law, a reviewing court will, if asked by the defendant, review the jury's award under *two separate standards*: 1) under the "bias, passion, prejudice, or other improper motive" standard **and** 2) under the "goes beyond that necessary to accomplish society's goals of punishment and deterrence" standard in light of the *Hammond/Green Oil* factors. *See Green Oil*, 539 So. 2d at 222-24. In short, contrary to Petitioners' arguments, a punitive damages verdict will be remitted on the grounds of excessiveness, even if the reviewing court finds that

the verdict is not the result of "bias, passion, prejudice, or other improper grounds," if the reviewing court finds that the award "goes beyond that necessary to accomplish society's goals of punishment and deterrence."

Moreover, Petitioners misconstrue Alabama's post-judgment review procedures when they conclude that "Alabama's excessiveness standard identifies the *most* egregious conclusion the jury could have reached from the evidence or the inferences therefrom and, ignoring the totality of the evidence, uses that standard as its benchmark for excessiveness," because "Alabama's review contemplates letting the award stand unless it is so excessive as to be 'plainly and palpably wrong and unjust.' " [Pet. at 16 (citing *Continental Eagle Corp. v. Mokrzycki*, 611 So. 2d 313, 322 (Ala. 1992))]. The "plainly and palpably wrong and unjust" standard cited by Petitioners applies to a defendant's challenge of a jury verdict *on sufficiency of the evidence grounds.*[5] *Continental Eagle Corp. v. Mokrzycki*, 611 So. 2d 313, 321 (Ala. 1992) ("We may not reverse the judgment, based on a jury verdict, on the grounds that the evidence was insufficient unless that evidence, when viewed in a light most favorable to [plaintiff], indicates that the verdict was 'plainly and palpably wrong and unjust.' "). The "plainly and palpably wrong and unjust" standard does *not*, however, apply when a party argues that a jury's punitive damages verdict "goes beyond that necessary to accomplish society's goals of punishment and deterrence." Such a challenge, instead, is examined in light of the *Hammond/Green Oil* factors. Because the "plainly and palpably wrong and unjust" standard does not apply to *Hammond/Green Oil*

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[5] In their cross-appeal to the Alabama Supreme Court, Petitioners did *not* raise any sufficiency of the evidence objections to the jury's $4.5 million verdict. Likewise, defendants did *not* contend that the jury's verdict was tainted by bias, passion, prejudice, corruption or any other improper motive or cause.

post-judgment reviews, Petitioners' supposition that Alabama's excessiveness standard uses the most egregious conclusion the jury could have found as its benchmark for excessiveness is wholly without merit.

In sum, Alabama's post-judgment procedure for review of punitive damages awards "provides the defendant with fundamental fairness while at the same time allowing society to perpetuate the punishment and deterrence of unacceptable conduct." *Killough v. Jahandarfard*, 578 So. 2d 1041, 1045-46 (Ala. 1991). In its own due process review of its procedures, the Alabama Supreme Court has explained:

> "In 'an abundance of concern for the preservation and protection of a defendant's constitutional right to due process,' *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989), this Court has created the *Hammond* post-verdict procedure. By the *Hammond* procedure, the civil defendant is protected in two ways: 'First, a requirement of "reasonableness, of proportionality, of sensible relation between punishment and offense," and, second, a guarantee of "not just bare survival, but continued productive economic viability," '; 'due process mandates at all times, in all circumstances, and for all defendants, "fundamental fairness" at the hands of the law.' C. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 156, 151-52, as quoted in *Industrial Chemical*, 547 So. 2d at 838, 835. The mandates of due process within the punitive damages context also require a balance between the due process rights of the plaintiff and those of the defendant. *Id.* at 835. This is the goal of *Hammond* – a balance of rights for both plaintiff and defendant."

Killough, 578 So. 2d at 1045.

B. Due Process Did Not Require Pure Prospective Application

"When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. See *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932) ('We think the federal constitution has no voice upon the subject [of whether a state court may decline to give its decisions retroactive effect]')." *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 177, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990). In the present case, the Alabama Supreme Court declared Alabama Code Section 6-5-547 unconstitutional under the Alabama Constitution of 1901. [Pet. App. at 5; 17-18; 21 ("Moreover, because Smith does not challenge § 6-5-547 under any provision of the United States Constitution, our analyses and conclusions are based entirely on adequate and independent state law grounds.")]. Because the issues involved in *Smith v. Schulte* were exclusively state law issues, the Alabama Supreme Court had the authority to determine the retroactivity of its decision. Therefore, the Alabama Supreme Court's decision to declare the statute inoperative as if it had never been enacted is a matter of state law which this Court has no authority to review.

Even if, assuming *arguendo*, the Alabama Supreme Court's decision must be reviewed in light of the Due Process Clause, due process does not mandate a purely prospective application. In fact, this Court has infrequently resorted to pure prospectivity. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536, 111 S. Ct. 2439, 115 L. Ed. 2d 481, 488 (1991). Moreover, even under the three-part test enumerated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), the Alabama Supreme Court was not required to apply its decision in *Smith v. Schulte* purely prospectively.

First, the Alabama Supreme Court's decision in *Smith v. Schulte* was an issue of first impression which *was* clearly foreshadowed. From the moment it was enacted

into law, the constitutional validity of Section 6-5-547 was the subject of serious debate. *See*, Worel, *The Alabama Medical Liability Act of 1987 – Can it Withstand Judicial Scrutiny?*, Ala. Trial Law. J. (Fall, 1987); Worel, *The Alabama Medical Liability Act of 1987 – Can it Withstand Judicial Scrutiny? Part II*, Ala. Trial Law. J. (Summer, 1988); Nelson, *Tort Reform In Alabama: Are Damages Restrictions Unconstitutional?*, 40 Ala. L. Rev. 533 (1989). Also telling, the only other tort reform damages cap contained in Alabama's Medical Liability Act of 1987 was declared unconstitutional in 1991. *Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1991).

Second, prior to the enactment of Section 6-5-547, health care providers who were sued for the wrongful death of their patients did not enjoy any special protection from an award in excess of $1 million. The court's decision in *Smith v. Schulte* was its first opportunity to consider the validity of the statute. If the court had applied its decision declaring the statute invalid purely prospectively, it would have furthered the operation of a constitutionally infirm statute for the benefit of some medical malpractice defendants, but not others. This result is inequitable and impermissible.

Most importantly, there is no danger that the court's decision in *Smith v. Schulte* will produce "substantial inequitable results" by retroactive application. First, the court's retroactive application of *Smith v. Schulte* is consistent with other Alabama Supreme Court opinions which declared statutory caps unconstitutional. *See, e.g., Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1991) (in striking down the $400,000 cap on non-economic damages imposed by Alabama Code Section 6-5-544(b), the court made no mention of any limitation on retroactive application of its ruling); *Henderson v. Alabama Power*, 627 So. 2d 878, 894 (Ala. 1993) (in striking down the $250,000 cap on punitive damages, the court remanded the case with instructions to the trial court "to reinstate

the full amount of the verdict").[6] Second, as stated above, the constitutional validity of § 6-5-547 has been the

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[6] The Alabama Supreme Court's decision is also consistent with other state courts. In *McGuire v. C & L Restaurant Inc.*, 346 N.W.2d 605 (Minn. 1984), for example, the Minnesota Supreme Court held that the damage cap limiting liability of a vendor to $250,000 for all damages to one person arising out of a single instance of the illegal sale and barter of an intoxicating liquor unconstitutionally deprived the motorcyclist of equal protection of the laws. Rejecting the same retroactivity argument defendants raised in the instant case, the Minnesota Supreme Court held:

> "Finally, respondent argues that in the event of our holding the 'damage cap' of section 340.95 unconstitutional, the rule of unlimited liability of intoxicating liquor vendors should apply prospectively only. Respondent relies on *Spanel v. Mounds View School District No. 621*, 264 Minn. 279, 118 N.W.2d 795 (1962). There we abrogated the substantive tort law that sovereign immunity was a defense available to state subdivisions, but we made the ruling prospective because the school district had relied upon the existence of the immunity defense and had not had the opportunity to secure liability insurance. In so doing, this court recognized an exception to the general rule providing that when the court prospectively overrules a rule of law, the new rule is applied to the case before the court and to claims arising after the date of the overruling decision. *Beaudette v. Frana*, 285 Minn. 366, 173 N.W.2d 416 (1969); *Silesky v. Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966). See generally Note, *The Retroactivity of Minnesota Supreme Court Personal Injury Decisions*, 6 Wm. Mitchell L.Rev. 179 (1980). Assuming that respondent had obtained insurance coverage only to the statutory limit, a fact we do not know, undoubtedly there is the appearance of injustice because the legal ramifications of its action were unpredictable at the time of purchase. However,

subject of serious debate from the moment it was enacted into law. The incident which gave rise to this cause of action occurred in 1989. Petitioners and their insurer have known of the very real possibility that the statute would be declared unconstitutional and therefore could not legitimately rely on the cap. Moreover, Dr. Schulte testified that he did *not* purchase a liability insurance policy with limits of $1,000,000 because of the cap. Instead, "when I came to town and started working, that's what everybody I worked with had, and that was pretty much the accepted limits in town." [Schulte Post-Judgment Depo. at p. 37].

To the extent Petitioners did rely on the cap, they did so at their peril, particularly since the Alabama Supreme Court had already declared unconstitutional the only other damages cap contained in the Medical Liability Act nearly two years before the instant case even went to trial. *See, supra*. Moreover, as Dr. Schulte admitted in his deposition, Petitioners were aware of Mr. Smith's challenge to the constitutionality of Section 6-5-547 in this case long before the case went to trial. [Ex. 5 to Schulte

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> the same could be said of the defendants in the cited cases. Moreover, ***prospectively declaring the 'damage cap' unconstitutional would ignore the law's policy of providing incentive for challenging unconstitutional statutes***. *Wegan*, 309 N.W.2d at 283 (Amdahl, J., concurring specially). ***Finally, if the court finds a statute unconstitutional, the statute is not a law; it is just as inoperative as if it had never been enacted***. *See State v. One Oldsmobile Two-Door Sedan*, 227 Minn. 280, 35 N.W.2d 525 (1948); *Gamble-Robinson Co. v. Pennsylvania Railroad Co.*, 157 Minn. 306, 196 N.W. 266 (1923). Therefore, it follows that our decision that the 'damage cap' is unconstitutional precludes our holding that this ruling should be applied only prospectively."

Id. at 611 (emphasis added).

Post-Judgment Depo]. Finally, each Petitioner has its own policy of insurance with limits of $1 million.

Due process, therefore, did not require the court to prospectively apply its decision.

C. Justice Shores' Refusal To Recuse Herself Did Not Violate The Due Process Clause

Justice Janie Shores'[7] participation in the Alabama Supreme Court's decision did not violate Petitioners' Fourteenth Amendment right to a fair tribunal. Although state statutes and/or judicial canons may permit recusal for personal bias or prejudice, bias or prejudice "alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820, 106 S. Ct. 1580, 89 L. Ed. 2d 823, 832 (1986). "[O]nly in the most extreme of cases would disqualification [based on allegations of bias or prejudice] be constitutionally required [under the Due Process Clause]." *Lavoie*, 475 U.S. at 821 (1986). Justice Shores' opinions expressed in her law review article, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 Ala. L. Rev. 61 (1992), do not indicate any bias or prejudice on her behalf against the Petitioners, much less rise to the level of extreme bias or prejudice as alleged by Petitioners. Therefore, due process did not require Justice Shores to recuse herself.

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[7] Justice Janie Shores is one of the most highly respected state court supreme court justices in the country. Prior to her election to the court in 1974, Justice Shores served as a law clerk to the late Alabama Supreme Court Justice Robert T. Simpson, as a member of the legal staff of Liberty National Life Insurance Company, and as a professor of law at Cumberland School of Law. Most recently, Justice Shores is a faculty member of the prestigious group of 24 appellate judges for the 10th Appellate Practice Institute which will be held May 17-19, 1996, in Washington, D.C. She is literally known as a leading citizen of our state. Her reputation and character are beyond reproach.

Most importantly, Justice Shores' article was written *after* the Alabama Supreme Court's decision in *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991).[8] In *Moore*, a plurality concluded that a statutory cap which limited non-economic loss in medical malpractice cases to $400,000 violated medical malpractice plaintiffs' rights to equal protection under the Alabama Constitution. *Moore*, 592 So. 2d at 168-69. In reaching its decision in *Moore*, the Alabama Supreme Court examined a seminal study conducted by the United States General Accounting Office ("GAO") and two other studies directly addressing the effects of medical malpractice tort reform[9] and concluded that "the correlation between the damages cap imposed by § 6-5-544(b) and the reduction of health care costs to the citizens of Alabama is, at best, indirect and remote." *Id.* at 168.

In the present case, the Alabama Supreme Court adopted *Moore's* statistical analysis to conclude that the $1 million cap in wrongful death actions against health care providers violated the equal protection guarantee of the Alabama Constitution.[10] [Pet. App. at 16-17]. In short,

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[8] Justice Shores cited *Moore v. Mobile Infirmary Ass'n* in her article. Justice Janie L. Shores, *A Suggestion For Limited Tort Reform: Allocation Of Punitive Damage Awards To Eliminate Windfall*, 44 Ala. L. Rev. 61, 86 n.149 (1992). Additionally, a brief synopsis of *Moore* was reported in the same volume of the Alabama Law Review that published Justice Shores' article. Recent Decision, *Statutory Damages Cap For Medical Malpractice Cases Found Unconstitutional*, 44 Ala. L. Rev. 263 (1992).

[9] Neither the "medical malpractice" GAO study nor the other two medical malpractice studies were discussed in Justice Shores' article.

[10] Specifically, after quoting *Moore's* entire statistical analysis discussion, the court explained:

> "The plurality's statistical analysis of § 6-5-544(b), which section formed part and parcel of the same 'tort reform package' as § 6-5-547, is equally

it was the *Moore* opinion, not Justice Shores' article, which controlled the Alabama Supreme Court's decision in *Smith v. Schulte*. Petitioners' contention that Justice Shores' "involvement in the opinion and judgment infected the decision against Petitioners with the taint of bias and prejudice in violation of due process" is therefore wholly without merit. [Pet. at 27].

Moreover, Justice Shores' article does not express any opinions regarding the medical malpractice statute challenged, the legislature's rationale for passing the legislation, or the constitutional issues (equal protection and right to trial by jury) raised by Mr. Smith on appeal. Instead, a complete reading of Justice Shores' article reveals that the sole purpose of her commentary is to offer a solution to the issue of whether the plaintiff should receive the punitive damages assessed by juries. After thoroughly evaluating the United States' punitive damages system and after presenting arguments and criticisms articulated by other commentators (both for and against punitive damages), Justice Shores contends that courts should allocate payment of such damages to persons or entities other than the plaintiff (such as a common fund for reducing the harm for which the defendant is found liable). Justice Shores' position therefore gives neither party any real advantage or disadvantage with the court with regard to an equal protection challenge.

Assuming, *arguendo*, that Justice Shores did have an opinion regarding the statutory cap for wrongful death recoveries against health care providers, the effect of her opinion was counteracted by the opinions of the other members of the court. All justices have opinions. It is

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applicable to this case, as are its conclusions regarding the inherent inequities of the damages cap.

"Indeed, the classifications created by § 6-5-547 are singularly bizarre and anomalous in view of the particular right of action to which the statute applies."

Pet. App. at 16-17.

impossible to create a viable judiciary that is void of such opinions. However, our society has created an effective judiciary by establishing panels which essentially balance several persons' understandings and opinions. As a member of the Alabama Supreme Court, Justice Shores was not the sole decision-maker in this case. Her opinions and decisions were combined with those of the other justices to reach a collective decision.[11]

Justice Rehnquist's opinion in *Laird v. Tatum*, 409 U.S. 824, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972), provides support for this position. In *Laird*, respondents moved to recuse Justice Rehnquist from participating in their case "because of testimony [he] gave on behalf of the Department of Justice before the Subcommittee on Constitutional Rights of the Judiciary Committee of the United States Senate at its hearings on 'Federal Data Banks, Computers and the Bill of Rights,' and because of other statements [he] made in speeches related to this general subject." *Laird*, 409 U.S. at 824. In refusing to recuse himself, Justice Rehnquist noted that "none of the former justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench." *Id.* at 831. In his research, Justice Rehnquist discovered that many justices sat in cases where they had previously (1) drafted the legislation challenged or interpreted in the case, (2) wrote extensively on issues presented to the Court, and/or (3) decided the exact same issue as Attorney General. *Id.* at 831-32; 835-36. Following this well-established precedent, Justice Rehnquist refused to disqualify himself.

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[11] In fact, four justices (Justice Ingram, Justice Shores, Justice Cook and Justice Kennedy) concurred with the per curiam opinion on the equal protection issue in *Smith v. Schulte*. Two other justices (Justice Almon and Justice Butts) concurred in the result regarding the equal protection issue.

In his opinion, Justice Rehnquist recognized the importance of the presumption against bias and the consequent duties of that presumption:

> "[O]ne's course of action may well depend upon the view he takes of the process of disqualification. Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is just as strong as the duty to *not sit* where *disqualified*."

Id. at 837 (emphasis in original). Finding the "equal duty" concept even stronger in the case of a Justice of the Supreme Court of the United States, Justice Rehnquist noted the grave difficulties which can arise from unnecessary recusals:

> "There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not 'bending over backwards' in order to deem one's self disqualified."

Id. at 837-38 (citations omitted). As the court of last resort for Alabama, the Alabama Supreme Court had similar

objectives to bear in mind when it refused to disqualify Justice Shores.

Most importantly, Justice Rehnquist recognized that "neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law." *Id.* at 838. Justice Rehnquist's reasoning is applicable in this case as well. Justice Shores' statements did not substantially support the presence of *any* bias or prejudice against *any* party on the issue of whether the statutory cap for wrongful death recoveries against health care providers was unconstitutional. Her recusal would not have, in any way, alleviated the petitioners' *alleged* danger. In fact, recusing Justice Shores would have only impeded her duty to decide the issue brought before her as an officer of the state judiciary. Such an action would have frustrated the notions of justice as they are embodied in our judiciary.

Citing *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986), Petitioners argue that Due Process mandates that the bench not display even an appearance of partiality. [Pet. at 26]. *Lavoie*, which defines the circumstances necessary for Due Process-based recusals, does not, however, require recusal in this case. In *Lavoie*, this Court addressed whether the Due Process Clause required the recusal of Justice Embry, who was a plaintiff in two separate cases against insurance companies, alleging, in both actions, bad-faith failure to pay a claim (the *Lavoie* case clarified Alabama's bad-faith law). *Lavoie*, 475 U.S. at 815, 817. Petitioner asserted two separate grounds for recusal: (1) "Justice Embry's general hostility towards insurance companies that were dilatory in paying claims, as expressed in his deposition," required his recusal under the Due Process Clause; and (2) Justice Embry had a direct stake in the outcome of the *Lavoie* case which

required his recusal under the Due Process Clause. *Id.* at 820, 821.

With regard to petitioners' claim that recusal was required because Justice Embry expressed a general hostility towards insurance companies, this Court refused to accept the insurer's argument that the justice's participation in the case, despite his general hostility toward insurance companies, violated the Due Process Clause.[12]

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[12] The Court recognized:

"[N]ot '[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.' *Tumey v. Ohio*, 273 U.S. 510, 523, 71 L. Ed. 749, 47 S. Ct. 437, 5 Ohio L. Abs. 159, 5 Ohio L. Abs. 185, 50 ALR 1243 (1927); *see also FTC v. Cement Institute*, 333 U.S. 683, 702, 92 L. Ed. 1010, 68 S. Ct. 793 (1948) ('[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level'). Moreover, the traditional common-law rule was that disqualification for bias or prejudice was not permitted. *See, e.g., Clyma v. Kennedy*, 64 Conn. 310, 29 A. 539 (1894). *See generally* Frank, *Disqualification of Judges*, 56 Yale L.J. 605 (1947). As Blackstone put it, 'the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.' 3 W. Blackstone, Commentaries *361. The more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice. *See Berger v. United States*, 255 U.S. 22, 31, 65 L. Ed. 481, 41 S. Ct. 230 (1921) (enforcing statute disqualifying federal judges in certain circumstances for personal bias or prejudice). *See also* ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980) ('A judge should disqualify himself . . . where he has a personal bias or prejudice concerning a party'). But that alone would

Holding that "only in the most extreme cases would disqualification on this basis be constitutionally required," the Court found that Aetna's allegations of bias and prejudice based on Justice Embry's "general hostility" were "insufficient to establish any constitutional violation." *Id.* at 821.

Thus, a justice's bias was not considered to be "extreme" in a case where he had directly professed a frustration with a class of parties and where he had indicated that he had negative personal experiences with such parties. If such comments did not exhibit the "extreme" bias required for a constitutionally required recusal, then surely Justice Shores' prior comments and "conclusions" contained in a law review article did not require recusal based upon constitutional grounds.

Although Justice Embry's "general bias" in *Lavoie* was insufficient to establish a constitutional violation, he *was*, however, recused for having a direct stake in the outcome of the case, which *did* violate the Due Process Clause. Because Justice Embry had two cases pending in lower courts which would have been affected and bound by *Lavoie*, this Court held that Justice Embry should have been recused because he had a direct, personal, substantial pecuniary interest in the case which violated the Fourteenth Amendment and undermined the appearance of impartiality. *Id.* at 821.

Contrary to *Lavoie*, Justice Shores had no direct, personal, substantial pecuniary interest in the outcome of this litigation. Justice Shores was, therefore, not required to recuse herself on constitutional grounds.

In *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir. 1992), the Third Circuit ordered the recusal of a district court judge because of statements he made in an opinion regarding discovery issues raised by the defendant (the

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not be sufficient basis for imposing a constitutional requirement under the Due Process Clause."

Lavoie, 475 U.S. at 820.

tobacco industry). Specifically, in his discovery order, the trial judge in *Haines* accused the defendant tobacco industry of being "the king of concealment and disinformation." *Haines*, 975 F.2d at 97. The trial judge's accusations were prominently reported in the *New Jersey Star Ledger*, the *New York Times*, the *Wall Street Journal*, the *Washington Post*, the *Chicago Tribune*, and the *Los Angeles Times*. *Id.* at 97. In light of the judge's accusations and conclusions directed toward the defendant, the Third Circuit assigned the case to another district judge.

Contrary to *Haines*, Justice Shores did not make any negative, biased, or derogatory comments about Petitioners or about their class (defendant health care providers) in her article. In fact, Justice Shores did not mention the statute (Alabama Code Section 6-5-547) involved in *Smith v. Schulte* even once throughout her entire article. Instead, Justice Shores merely addressed the general arguments presented in the ongoing debate over punitive damages and discussed a possible solution to the "windfall" concern: alternative allocations of punitive damage awards.

In short, Justice Shores' comments and opinions contained in her article did not rise to the level of extreme bias or prejudice to constitutionally require her disqualification from participating in the *Smith v. Schulte* decision.

CONCLUSION

This Petition for Writ of Certiorari is born of nothing more than a medical malpractice insurer's refusal to seriously consider the defendant doctor's repeated requests that this wrongful death case be settled for an amount within the limits of his coverage. Dr. Schulte repeatedly admitted his fault in causing Mrs. Smith's death; nevertheless, his (and his group's) insurer insisted on presenting an aggressive defense at trial – one which no doubt backfired given the trial court's findings and the size of the verdict. The insurer's "deny and defend at any

cost" mentality resulted in a punitive damages verdict in excess of those coverage limits, and, now, the insurer faces a lawsuit for its refusal to settle.

When Petitioners' arguments on appeal were soundly rejected by the Alabama Supreme Court, Petitioners framed their state law issues in terms of violations of the federal constitution with the hope that this Court might find some connection with other Alabama punitive damages cases sufficient to warrant certiorari review. Contrary to Petitioners' representations, however, this case does not involve an outrageous verdict which was unsupported by the facts. Instead, as demonstrated above, the jury's verdict was amply supported by substantial evidence at trial, and Petitioners received all the constitutional protections they were due.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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